APPELLANT PRO SE:

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IN THE COURT OF APPEALS OF INDIANA

FREDERICK A. YOUNG,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 84A05-0611-PC-630
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0512-PC-3370

August 8, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

This case involves Frederick Young's ("Young") petition for post-conviction relief from his conviction of Class A felony child molesting. On appeal, Young contends that the Vigo Superior Court erroneously entered summary disposition denying his petition without first holding an evidentiary hearing. We affirm.

Facts and Procedural History

The facts of this case were set forth in our August 29, 2005 memorandum decision affirming Young's conviction:

> [O]n August 25, 2003, twelve-year-old S.P. was at her home in Terre Haute when her mother went to the store. Young, who was a family acquaintance, entered S.P.'s bedroom and prevented her from leaving. Young pushed S.P. onto her bed, pulled down his pants and boxer shorts, pulled up S.P.'s skirt to her waist, and pulled her underwear down to her feet. Young performed oral sex on S.P., and masturbated and ejaculated on S.P.'s stomach. When S.P.'s mother returned, Young ran downstairs. Later that day, S.P told her mother what had happened. DNA testing later confirmed that Young's semen was on S.P.'s skirt and a towel that S.P. used to wipe Young's semen off her skin.

Young v. State, No. 84A01-0412-CR-531 (Ind. Ct. App. Aug. 29, 2005), trans. denied.

On December 2, 2005, Young filed a petition for post-conviction relief, alleging newly discovered evidence of perjury of a witness, insufficiency of the evidence, evidence tampering, and ineffective assistance of counsel. The State filed an answer to Young's petition, raising the affirmative defenses of waiver, res judicata, and laches. The trial court held a post-conviction hearing on May 12, 2006. At this time, Young told the court that he had no witnesses present to testify. Young told the court that the basis for his petition for post-conviction relief was based upon ineffective assistance of counsel and perjury of the witnesses. The trial court ordered him to present evidence supporting his claims via affidavits.

The State filed a motion for summary judgment on June 30, 2006. Young responded, reiterating the claims he had made in his petition. He did not designate any evidence to the trial court. The trial court held a summary judgment hearing on September 7, 2006. At this hearing, the trial court stated:

> [T]he State filed a motion for summary judgment, alleging that there are no issues of material fact and that under any construction the Petitioner's Petition cannot succeed, and a brief, and it speaks for itself. The Petitioner has filed a response, genuine Issue of Material Facts Amended, uh, which is a filing that's not affirmed, and there is no designation of evidence with it. There is just a statement of potential things. So, the rule requires that to oppose a motion for summary judgment you have to file a designation of evidence which would include sworn statements, some kind of designation of evidence which you have not done, Mr. Young, therefore the uh – under our rules the motion of the State must be granted, although I would add that even if you had, I don't think there is a genuine issue of material fact here.

Tr. pp. 3-4. Young now appeals. Additional facts will be provided as necessary.

Standard of Review

In the case at hand, the trial court granted the State's motion for summary disposition under Indiana Post-Conviction Rule 1(4)(g) (2007). This rule provides, in relevant part:

> The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

When a post-conviction court disposes of a petition under subsection (g), we review the lower court's decision as we would that of a motion for summary judgment. Hough v. State, 690 N.E.2d 267, 269 (Ind. 1997); Allen v. State, 791 N.E.2d 748, 753 (Ind. Ct. App. 2003), trans. denied. We face the same issues that were before the post-

conviction court and follow the same process. Allen, 791 N.E.2d at 753. A grant of summary disposition is erroneous unless "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." P-C.R. 1(4)(g). On review, the appellant has the burden of persuading us that the post-conviction court erred and we must resolve all doubts about facts, and the inferences to be drawn therefrom, in favor of the nonmovant. Allen, 791 N.E.2d at 753.

Discussion and Decision

Young contends the trial court erroneously granted summary judgment in favor of the State without first holding an evidentiary hearing. "A post-conviction court is permitted to summarily deny a petition for relief if the pleadings and the record conclusively demonstrate that there is no genuine issue of material fact and the petitioner is entitled to no relief." Howard v. State, 576 N.E.2d 1253, 1254 (Ind. 1991) (citing P-C.R. 1(4)(g)). The term "record" in the context of Post-Conviction Rule 1(4)(g), refers to any depositions, answers to interrogatories, admissions, stipulations of fact, and affidavits that have been submitted by the parties.

With regard to the ineffective assistance of counsel claim, the State designated an affidavit by Young's attorney, William Earls, ("Earls"), which detailed how he had vigorously defended Young with numerous pre-trial motions and depositions of witnesses. The State also designated a newspaper article where Young was quoted as being satisfied with Earls's performance. Young contends that there are genuine issues of material fact regarding his attorney's alleged substance abuse problem and alleged conflict of interest in representing another defendant charged with molesting the same

victim. Young designated no evidence to the trial court to support these contentions, and moreover, he failed to establish how these alleged facts caused his counsel's performance to be deficient. To establish the ineffectiveness of counsel, the petitioner must first show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. See Wilson v. State, 565 N.E.2d 761, 765 (Ind. Ct. App. 1990) (quoting Strickland v. Washington, 466 U.S. 668 (1984)).

As far as Young contends there was insufficient evidence supporting his conviction, this argument is waived. If an issue was available for litigation in a direct appeal but was not in fact raised, then the issue has been waived. Becker v. State, 719 N.E.2d 858, 860 (Ind. Ct. App. 1999). Young contends "that there is no evidence that S.D.P. had contact with his mouth." Br. of Appellant at 9. Young offers no reason as to why he could not have made this claim in his direct appeal, and therefore, the issue is waived.

Regarding Young's contention of evidence tampering, we can find no specific allegation in the record of what evidence was tampered with and how. Furthermore, Young has failed to even mention this contention in his appellant's brief. Therefore, this issue is waived for failure to make a cogent argument. See Ind. Appellate Rule 46(A)(8)(a) (2007).

Lastly, Young contends that newly discovered evidence warrants a new trial. Specifically, Young claims that he has been given information that a witness at his trial perjured herself. The decision to grant or deny a motion predicated on newly discovered

evidence rests within the sound discretion of the trial court. Chupp v. State, 509 N.E.2d 835, 837 (Ind. Ct. App. 1987) (citing Smith v. State, 455 N.E.2d 346, 351 (Ind. 1983)). We will not overturn the trial court's determination unless it was an abuse of discretion. Id.

A recantation or admission of perjury does not necessarily mandate the grant of a new trial. Strain v. State, 560 N.E.2d 1272, 1274 (Ind. Ct. App. 1990), trans. denied. Rather, our supreme court has articulated a nine-part test for determining whether to grant a new trial upon a motion to correct error based on newly discovered evidence. See Fox v. State, 568 N.E.2d 1006, 1007 (Ind. 1991). Such motion must be supported by one or more affidavits that demonstrate:

> (1) that the evidence has been discovered since the trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.

Bradford v. State, 675 N.E.2d 296, 302 (Ind. 1996) (citing Fox, 568 N.E.2d at 1007).

The defendant bears the burden of showing that the newly discovered evidence meets the standard for a new trial. Bradford, 675 N.E.2d at 302 (Ind. 1996) (citing Nunn v. State, 601 N.E.2d 334, 337 (Ind. 1992)). Young fails in this regard. Young contends that one witness, Paula Pearman ("Pearman"), visited him in jail and admitted to giving perjured testimony. Br. of Appellant at 11. However, he claims that she refuses to sign an affidavit because of her fear of being charged with perjury. Id. If this alleged recantation cannot be reproduced under oath, then a new trial would prove a fruitless endeavor.

Furthermore, even assuming Young's allegation were true, a recantation, or even an admission of perjury, does not necessarily mandate the grant of a new trial if the introduction of the evidence would not probably result in a different outcome. Strain, 560 N.E.2d at 1274. Young has failed to provide this court with any meaningful review of the trial record. However, upon our own review of the record, it appears that the State presented evidence that Young's sperm was found on the victim's skirt as well as on a towel that the victim said she had used to wipe herself off. Given the victim's testimony and the physical evidence linking Young to the crime, we are not convinced that the alleged perjury would produce a different result. Consequently, the trial court did not abuse its discretion in summarily dismissing Young's post-conviction petition for relief.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.